IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 1052

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 880, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONERS' REPLY BRIEF

The brief of the National Labor Relations Board in Opposition fails entirely to meet the hard and important questions of national labor policy raised by this case. Instead the Board's brief rests on the tendentious contention that the decision below "turns on the particular facts of this case" (Op. Br. 8). While this case, like all cases, was decided on the basis of record facts, these "particular facts" pose critical legal issues. The Board's response to these issues consists of scarcely more than a digest of the conclusions of the court below.

1. Regarding the novel, far-reaching question of whether the Labor Act requires a labor union to engage in collective

bargaining with its own democratically elected officials, the Board's Brief in Opposition does not respond to our contention that the Board's ruling on this point will adversely affect thousands of American labor unions, not to speak of untold other democratic, membership organizations. Similarly the Board does not answer our contention that this is the first time in the 30-year history of the Labor Act that the Board has so ruled.

The Board's defense of the merits of its decision is grossly unresponsive. We contend that the Labor Act was not designed to apply to legitimately elected union officials whose tenure and conditions of employment are fixed by a democratic, constituent assembly (Pet. 14-17). In response to this contention, the Labor Board says only that these elected officials are "employees" because their election and the establishment of their working conditions by democratic convention action "were more formal acts than they were realities . . ." (Op. Br. 9-10). Presumably, therefore, the Board would distinguish, on the one hand, between union officers whose election is more "real" than "formal" and, on the other hand, those whose election is more "formal" than "real." As our Petition shows, there is neither precedent, statutory authority, nor common sense to support the Board's position. Despite our challenge (Pet. 16), the Board has never yet explained how a constituent assembly of elected union delegates should go about engaging in collective bargaining with its elected officers.

2. The Board's answer to our contention that the RCIA was denied a fair hearing as a result of the revocation of its *subpoena duces tecum* on the AOA is less than candid. The Board's brief says that the "court below properly held that, at most, the revocation was 'harmless' error" (Op. Br. 11). The court below did not hold that "at most" the revocation was "harmless" error; the court below held flatly that it was "error not to grant the subpoena, espe-

cially as 'requests for subpoenas should be viewed sympathetically in order to ensure a fair hearing' " (Pet. A-12). After holding that the revocation was plain error, the court below proceeded to speculate that the AOA did not constitute a threat to the incumbent officers of the RCIA. As we pointed out in our Petition, this was speculation *dehors* the record.

The plain fact is that there simply cannot be anything "harmless" about the error of revoking a *subpoena duces tecum* with respect to evidence which, if produced, would constitute a complete defense to a charge of unlawful conduct. This is particularly so in proceedings before the NLRB, for under the Labor Act a respondent has no means other than a *subpoena duces tecum* by which to secure access to relevant evidence in the possession of an adversary. Thus, the court below granted enforcement to the Board's order in the fact of that court's own ruling that the respondent before the agency had been unfairly and unlawfully deprived of the sole means available to prove its innocence.

Respectfully submitted,

S. G. LIPPMANN
TIM BORNSTEIN
1741 DeSales Street, N.W.
Washington, D. C. 20036

*Attorneys for Petitioners*

April, 1967